Todd F. Silbergeld
Director
Federal Regulatory

SBC Communications Inc.
1401 I Street, N.W.
Suite 1100
Washington, D.C. 20005
Phone 202 326-8888
Fax 202 408-4806

EX PARTE OR LATE FILED

February 26, 1999

EX PARTE PRESENTATION
Via Hand Delivery

Magalie Roman Salas
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: **Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98**

Dear Ms. Salas:

The enclosed letter concerning the above-referenced proceeding was hand delivered today to Lawrence E. Strickling of the Common Carrier Bureau. In accordance with the Commission's rules governing ex parte presentations, I am providing two copies of the enclosed letter.

If you have any questions concerning this matter, please contact me at 202-326-8888. Thank you for your consideration.

Sincerely,

Todd F. Silbergeld /gmk

Todd F. Silbergeld

Enclosures

cc: Kyle D. Dixon
Paul Gallant
Linda Kinney
Kevin Martin
Thomas C. Power

February 26, 1999

Lawrence E. Strickling, Esquire
Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 500
Washington, DC 20554

Re: **Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98**

Dear Mr. Strickling:

In its recent decision, the Supreme Court ruled that the FCC has general authority under 47 U.S.C. § 201(b) to promulgate rules relating to the dialing parity requirement of 47 U.S.C. § 251(b)(3). *AT&T Corp. v. Iowa Utils. Bd.*, No. 97-826 (and consolidated cases), 1999 WL 24568, at *9 (U.S. Jan. 25, 1999). Once the Eighth Circuit on remand revises its prior mandate to reflect the Supreme Court's judgment, the Commission will have an opportunity to consider again how to *exercise* its now-settled rulemaking authority in a manner consistent with the text and purposes of the Act as a whole. On behalf of SBC Communications, Inc. and its operating company affiliates[1] and U S WEST Communications, Inc., we respectfully submit this letter to set forth our views on this important issue.

In its original opinion in *California v. FCC*, 124 F.3d 934 (8th Cir. 1997), the Eighth Circuit had held that the Commission lacked authority to regulate any aspect of intrastate intraLATA dialing parity. The court concluded that the Act did not authorize the FCC to issue intraLATA dialing parity rules, "because the subsection addressing dialing parity, [47 U.S.C.] § 251(b)(3), does not mention the FCC." *Id.* On review, the Supreme Court proceeded from precisely the opposite presumption, concluding that the FCC's general rulemaking authority under 47 U.S.C. § 201(b) extends to intraLATA dialing parity, "since the provision addressing

[1] SBC's affiliated telephone operating companies include Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell.

dialing parity, § 251(b)(3), does not even mention the States." 1999 WL 24568, at *9. Although the Supreme Court's decision therefore establishes that the FCC's section 201(b) rulemaking authority extends to intrastate intraLATA dialing parity, the decision does not answer the question whether the Commission, in the exercise of that authority, may dictate by rule the manner in which States must exercise the discretion that Congress expressly left to them with respect to the *timing* of intraLATA toll dialing parity.

Section 271(e)(2) unambiguously gives States a role in determining when a Bell operating company must implement its general duty to provide intraLATA toll dialing parity. Congress recognized that requiring all carriers immediately to implement dialing parity for intraLATA toll calls would lead to an unfair competitive imbalance. Although most LECs are free to provide *inter*LATA toll service and therefore can compete on an even plane with long-distance carriers for both interLATA and intraLATA toll business, Congress imposed special restrictions on the Bell companies, which prohibit them from providing interLATA services until they obtain FCC authority pursuant to section 271. Congress concluded that forcing those Bell companies to provide intraLATA toll dialing parity immediately would allow long-distance carriers to exploit a temporary regulatory inequity by offering packages of interLATA and intraLATA services that the Bell companies would be unable to match.

To prevent long-distance carriers from unfairly capitalizing on this disparity, Congress established two rules in section 271(e)(2). *First*, Congress made clear in section 271(e)(2)(A) that, when a Bell company obtains authority to provide interLATA service in a State (that is, when it is free to compete with long-distance carriers for *all* toll traffic), the Bell company "shall provide intraLATA toll dialing parity throughout that State coincident with its *exercise* of that authority." 47 U.S.C. § 271(e)(2)(A) (emphasis added). *Second*, Congress provided in section 271(e)(2)(B) that "a State may not require a Bell operating company to implement intraLATA toll dialing parity in that state before a Bell operating company has been granted authority under this section to provide interLATA services originating in that State or before 3 years after February 8, 1996, whichever is earlier." *Id.* § 271(e)(2)(B).

Section 271(e)(2)(A) and section 271(e)(2)(B), therefore, specifically address the timing of intraLATA toll dialing parity for Bell operating companies. Subsection (A) establishes the *latest* date by which dialing parity must be implemented, and subsection (B) provides the *earliest* date by which a State may require such implementation. Congress left room, in the period between these two dates, for the exercise of state discretion.

That point is fortified by the second sentence of section 272(e)(2)(B), which provides that "[n]othing in this subparagraph precludes a State from issuing an order requiring intraLATA toll dialing parity in that State prior to either such dates [*i.e.*, the date on which the Bell operating company is granted authority to provide interLATA services or February 8, 1999] so long as such order does not take effect until *after* the earlier of either such dates." 47 U.S.C.

§ 272(e)(2)(B) (emphasis added). By specifying that a state order requiring intraLATA toll dialing parity may take effect *after* the earlier of these dates — and by imposing no deadline other than the one specified in section 271(e)(2)(A) — we believe that Congress plainly expressed its understanding that States are to retain control over the timing of intraLATA toll dialing parity between the earlier of the dates specified in section 272(e)(2)(B) and the absolute deadline specified in section 271(e)(2)(A).

Section 251(b)(3) does not change this analysis. It establishes only a general duty to provide all forms of dialing parity — interLATA toll, intraLATA toll, and local. But it does not address the question of timing. Indeed, the District Court for the Eastern District of Virginia explicitly addressed this question in a decision reached three weeks ago. *See AT&T Communications of Va., Inc. v. Bell Atlantic-Virginia, Inc.*, No. Civ. A.98-1721-A, 1999 WL 61596 (E.D. Va. Feb. 5, 1999) (holding that, although section 251(b)(3) imposes a duty on all LECs to implement intrastate intraLATA toll dialing parity, nothing in the Act itself imposes a deadline of February 8, 1999, for the implementation of intraLATA toll dialing parity).

Under this reading of the Act, each provision addressing dialing parity serves a distinct role. Section 251(b)(3) imposes on all local exchange carriers a duty to provide local and interLATA toll dialing parity; it imposes on all but Bell operating companies a duty to provide *intra*LATA toll dialing parity; and it imposes on Bell operating companies a duty to provide intraLATA toll dialing parity when the implementation of that duty is triggered either by the terms of section 271(e)(2)(A) or by a state order requiring implementation in accordance with section 271(e)(2)(B). It is only under this reading of the Act that section 271(e)(2)(A) has a meaning independent of section 251(b)(3); there would have been no reason for Congress to enact section 271(e)(2)(A) if section 251(b)(3) already performed the very same function. *See Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (relying on the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative").

Although the Supreme Court has now ruled that the Commission has general authority under section 201(b) to prescribe rules to carry out the provisions of the Act, the Court did not address the relationship between the timing provisions in section 271(e)(2) and the Commission's general rulemaking authority under section 201(b). Nor did the Eighth Circuit have any reason to address that issue. Having determined that the FCC's authority did not extend to any aspect of intrastate telecommunications, the Eighth Circuit had no occasion to consider the narrower question whether the Commission could require States to exercise their statutory discretion by a particular date. That question will now be squarely presented to the Commission on remand from the Eighth Circuit. And the answer, we submit, is that the Commission should not exercise its section 201(b) authority in that manner.

The Supreme Court's consideration of the Commission's pricing jurisdiction is entirely consistent with our argument concerning the timing of intraLATA toll dialing parity. Just as the

FCC's authority under section 201(b) to prescribe a pricing methodology does not disturb the States' authority under section 252(c) to determine "the concrete [pricing] result in particular circumstances" (1999 WL 24568, at *8), the FCC's general power under section 201(b) to prescribe rules governing dialing parity does not disturb the States' authority under section 271(e)(2)(B) to control the timing of a Bell company's implementation of intraLATA toll dialing parity.

The Commission's rulemaking authority is necessarily also circumscribed by section 251(d)(3), which provides that, "[i]n prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that — (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of [section 251] and the purposes of this part." 47 U.S.C. § 251(d)(3). In a ruling of which review was not sought in the Supreme Court, the Eighth Circuit held that, "[w]ith subsection 251(d)(3), Congress intended to preserve the states' traditional authority to regulate local telephone markets and meant to shield state access and interconnection orders from FCC preemption so long as the state rules are consistent with the requirements of section 251 and do not substantially prevent the implementation of section 251 or the purposes of Part II." *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 807 (8th Cir. 1997), *rev'd in part, aff'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, No. 97-826 (and consolidated cases), 1999 WL 24568 (U.S. Jan. 25, 1999). The Eighth Circuit rejected the assertion "that merely an inconsistency between a state rule and a Commission regulation under section 251 is sufficient for the FCC to preempt the state rule," for that would be "an unreasonable interpretation of the statute in light of subsection 251(d)(3) and the structure of the Act." *Id.*[2]

The Eighth Circuit's reading of section 251(d)(3) remains good law, even after the Supreme Court's decision. The Eighth Circuit's analysis did not rest on its general jurisdictional holding; indeed, it concluded that "[e]ven when the FCC issues rules pursuant to its valid rulemaking authority under section 251, subsection 251(d)(3) prevents the FCC from *preempting* a state commission order that establishes access and interconnection obligations" so long as the state commission order satisfies the conditions of section 251(d)(3). *Iowa Utils. Bd.*, 120 F.3d at 806.

---

[2] That analysis is fortified by section 261(b), which provides that "[n]othing in this part shall be construed to prohibit any State commission from . . . prescribing regulations . . . , in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part." Since the state laws in question are intended to "fulfill[] the requirements of" Part II (namely, section 251(b)(3)) and are "not inconsistent with" the provisions of Part II, section 261(b) protects them from federal preemption.

The Commission *may* have authority under section 201(b) to establish a "default deadline" for the implementation of intraLATA toll dialing parity — one that would control in the absence of an independent exercise of state discretion. But where a State specifically designates some other deadline properly within the range of the earliest and latest dates established by the statute — as several States in fact have done[3] — the state policy necessarily supplants any such default federal policy.

For the foregoing reasons, the Commission should respect the statutory authority of the States to impose a deadline for requiring a Bell company to implement intraLATA toll dialing parity during the period between February 8, 1999, and the date on which that Bell company begins providing interLATA services under section 271. Such a course would ensure that the Commission's regulations are consistent both with the terms of the Communications Act and with sound public policy.

Finally, we are concerned that the Commission may be contemplating issuing an order to establish a new deadline for implementing intraLATA toll dialing parity without first seeking public comment. Under 5 U.S.C. § 553(c), the Commission is required to "give interested persons an opportunity to participate" in a rulemaking proceeding before it issues or amends a regulation. Moreover, should the Commission consider preempting inconsistent state statutes or regulations under 47 U.S.C. § 253(d), it may do so only after providing "notice and an

---

[3] For example: **California**: Interim Opinion, *Alternative Regulatory Frameworks for Local Exchange Carriers and Related Matters (IntraLATA Presubscription Phase)*, Decision No. 97-04-083, Nos. 87-11-033 et al., 1997 WL 377077 (Cal. PUC Apr. 23, 1997) (directing Pacific Bell to make intraLATA equal access available to all of its California customers on the date that Pacific Bell affiliate begins competition in the long distance market); **Idaho**: *Petition of AT&T Communications of the Mountain States, Inc. for IntraLATA Equal Access and Carrier Presubscription in the Serving Territory of U S WEST Communications, Inc.*, Order No. 27837, Case No. GNR-T-94-5, at 9 (Idaho PUC Dec. 23, 1998) (establishing June 1, 1999, as the date by which U S WEST must submit an implementation plan for intraLATA toll dialing parity); **North Dakota**: N.D. Cent. Code § 49-21-08.1 (1998) (effective until July 31, 1999, intraLATA toll dialing parity "may not be required to be provided by any company providing local exchange service"); **South Dakota**: S.D. Codified Laws § 49-31-87 (Michie 1998) ("for purposes of intraLATA long distance telecommunications services, [dialing parity] may not be implemented by order of the commission until all providers of toll services are authorized to provide interLATA services which originate in this state"); **Texas**: Texas Util. Code Ann. § 55.009(a) (West 1999) ("If federal law prohibits a local exchange company in this state from providing interLATA telecommunications services, the local exchange companies in this state designated or de facto authorized to receive a '0-plus' or '1-plus' dialed intraLATA call are exclusively designated or authorized to receive such a call.").

opportunity for public comment." Public participation on this issue is particularly important given the fact that there is no current record to support either the establishment of a new implementation deadline or the preemption of statutes and regulations in those States that have chosen to operate on a different timetable.

Respectfully submitted,

Kathleen Abernathy /gmk
Kathleen Abernathy
Vice President-Federal Regulatory
U S WEST, Inc.

Dale (Zeke) Robertson /gmk
Dale (Zeke) Robertson
Senior Vice President
SBC Telecommunications, Inc.